TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 787

L. McLEOD, PETITIONER,

vs.

M. C. THRELKELD, ET AL., DOING BUSINESS AS THRELKELD COMMISSARY COMPANY, A PARTNERSHIP

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 4, 1943.

CERTIORARI GRANTED APRIL 5, 1943.

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[fols. 1-11]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION.

Civil Action

No. 705

L. McLeod

vs.

M. C. Threlkeld, J. H. Threlkeld, and M. C. Threlkeld, Jr., Doing Business as Threlkeld Commissary Company, a Partnership

Stipulation—Filed April 28, 1942

It is agreed and stipulated between the parties to the above entitled and numbered cause, acting herein by and through their respective attorneys thereunto duly authorized, as follows:

I

Threlkeld Commissary Company (hereinafter called "defendant") is a partnership composed of M. C. Threlkeld, J. H. Threlkeld, and M. C. Threlkeld, Jr. Each of these individuals is a citizen and resident of the State of California. It is engaged in the business of providing meals for certain employees of railway companies commonly known as maintenance of way employees who perform work upon the right of way, lines, and tracks of railway companies. De- [fol. 12] fendant, by a contractual arrangement with Texas and New Orleans Railroad Company (hereinafter called "railroad company"), furnishes boarding service which is available to the railroad company's maintenance of way employees. The board paid by such employees varies in accordance with the type of gang with which they are working, the employees in the B. & B. gangs paying the highest board and the employees in track extra gangs paying the lowest board. Most of the maintenance of way employees of the railroad company board with the defendant but some do not. In addition to furnishing meals to such employees

the defendant also furnishes bedding to the employees boarding with it. Employees boarding with the defendant sign wage deduction orders authorizing the railroad company to deduct from the wages of such employees the amount of board due by said employees and to pay the same over to defendant. Employees boarding with the defendant are not given credit for single meals missed (except when away on company business) but in all cases are given credit when three or more consecutive meals are missed after notice to the defendant.

II

Meals served to the railroad employees above mentioned are prepared and served in a cook and dining car running on the railroad's rails and attached to a particular gang or outfit. Employees of the railroad other than those in the gang or outfit to which a particular cook and dining car is attached on occasions are served therein and such em- [fol. 13] ployees pay at a fixed price per meal. Each cook and dining car is in charge of a cook employed by the defendant whose duty it is to cook and serve meals in the dining car and to keep the kitchen and dining car clean and suitable for the serving of meals. He is also required to keep an account of the meals served. In case of emergency work done by the maintenance of way employees the cook is required to prepare and serve meals during such emergency and to follow the crew to the point of such emergency work. Plaintiff L. McLeod was employed by defendant as a cook during the period from July, 1939, to May, 1941, and performed the duties of a cook as hereinbefore stated. He worked exclusively at points on the lines of the railroad company within the state of Texas. The foreman employed by the railroad company in charge of each gang to which a dining and cooking car is attached acts on behalf of defendant to check the supplies and receipts of each car and for these services he receives free board or in lieu thereof a monthly cash consideration.

III

Texas and New Orleans Railroad Company is a common carrier engaged in the interstate transportation of both goods and persons. Employees of the railroad in the gangs for which defendant furnishes board are engaged in the

work of constructing and maintaining the right of way and railroad lines of the railroad company in proper condition for the interstate transportation of persons and property by said railroad company. The practice of railroad companies with respect to the furnishing of meals for [fol. 14] maintenance of way employees varies—some railroads, as the Texas and New Orleans Railroad Company, make arrangements by contract for the furnishing of such meals or board by a commissary company, some railroads operate cook and dining cars for themselves for the benefit of such employees, some railroads furnish cook and dining cars to the employees who prepare and serve their own meals therein, and some railroads leave such employees entirely to their own devices for the procuring of their meals.

IV

Defendant, in addition to its operations in Texas on the lines of the Texas and New Orleans Railroad Company, has similar operations, under contracts with other railroads, in the states of Arizona, California, Colorado, Louisiana, Nevada, New Mexico, Oregon, and Utah.

V

The parties agree that if the court determines that plaintiff is covered by the Fair Labor Standards Act of 1938 they will make a bona fide effort to stipulate the amount of damages, if any, due to plaintiff.

Leon C. Levy, Attorney for Plaintiff. John P. Bullington, Attorney for Defendants.

[fol. 15] In the United States District Court for the Southern District of Texas, Houston Division.

[Title omitted]

The Court's Findings—Filed July 10, 1942

Now, in order that you may desire to file any further suggestions, I will make some findings on this testimony here, not that I regard it as particularly material, but it might be.

Of course I find that the Threlkeld Commissary Company

would serve meals occasionally, or whenever the occasion arose, to outsiders. The evidence is overwhelming on that. But it was not out there to make money in selling meals.

In the absence of some compelling reason to the contrary, I see nothing that would occasion the promulgation of a rule not to feed anybody else, but I think even if they did, this case would fall under the rule generally laid down, but I recognize some of the cases, for instance where a workman is engaged in the sale of goods that are tendered for commerce, and part of them go in commerce and part do not. The burden is on him to prove the present time.

[fol. 16] And in the case of the plaintiff's particular work, I find that he has not served outsiders during the particular time involved in this suit, as I understand it is the immediate two years prior to that. This testimony relates surely to what happened a long time ago, and that anything he might have served outside, in the old southwestern style is, generally an outsider might be asked if he wanted to come up, anybody, and give him a cup of coffee. It is so infinitesimally small as compared to what was done or generally served as to amount to not serving anybody but the employees of the railroad company, to such a minute degree that it is impossible of proof; and I find, based on the evidence here before me that during the period in question the plaintiff has only served meals to employees of the railroad company. I think the evidence is overwhelming to that effect. He so testifies, and others testify to it. Mr. Kitchen said 'he served one meal to me, I think on the Rio Bravo job', which was several years before the time involved in this suit, or some time before, and he invited him to have a cup of coffee with him several times, or a good many times, but I don't regard that as being material.

Now, I don't know what effect that will have on the suit, gentlemen, but that is about this testimony.

(Clerk's note: The foregoing "Court's Findings" came to the Clerk with other papers in this case from Judge Kennerly's Chambers and were filed on the date shown).

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted)]

OPINION—Filed July 10, 1942

KENNERLY, District Judge:

This is a suit by Plaintiff, an employee, against Defendants, his employer, for wages, overtime compensation, damages, attorney's fees, etc., under the Fair Labor Standards Act of 1938 (Sections 201 to 219, Title 29, U. S. C. A.), and this is a partial hearing under Rule 42(b) of the case on the merits. Plaintiff affirms and Defendants deny that the facts bring them within the scope of Sections 6 and 7 of the Act. Defendants say, however, that if they do, they are exempt under Section 13 of the Act. This Plaintiff denies.

(a) The main facts have been stipulated as follows:

[fol. 18] "It is agreed and stipulated between the parties to the above entitled and numbered cause, acting herein by and through their respective attorneys thereunto duly authorized, as follows:

Threlkeld Commissary Company (hereinafter called "defendant") is a partnership composed of M. C. Threlkeld, J. H. Threlkeld, and M. C. Threlkeld, Jr. Each of these individuals is a citizen and resident of the State of California. It is engaged in the business of providing meals for certain employees of railway companies commonly known as maintenance of way employees who perform work upon the right of way, lines, and tracks of railway companies. Defendant, by a contractual arrangement with Texas and New Orleans Railroad Company (hereinafter called "railroad company"), furnishes boarding service which is available to the railroad company's maintenance of way employees. The board paid by such employees varies in accordance with the type of gang with which they are working, the employees in the B. & B. gangs paying the highest board and the employees in track extra gangs paying the lowest board. Most of the maintenance of way employees of the railroad company board with the defendant but some do not. In addition to furnishing meals to such employees the defendant also furnishes bedding to the employees boarding with it. Em-

ployees boarding with the defendant sign wage deduction orders authorizing the railroad company to deduct from the wages of such employees the amount of board due by said employees and to pay the same over to defendant. Employees boarding with the defendant are not given credit for single meals missed (except when away on company business) but in all cases are given credit when three or more consecutive meals are missed after notice to the defendant.

Meals served to the railroad employees above mentioned are prepared and served in a cook and dining car running on the railroad's rails and attached to a particular gang or outfit. Employees of the railroad other than those in the gang or outfit to which a particular cook and dining car is attached on occasions are served therein and such employees pay at a fixed price per meal. Each cook and dining car is in charge of a cook employed by the defendant whose duty it is to cook and serve meals in the dining car and to keep the kitchen and dining car clean and suitable for the serving of meals. He is also required to keep an account of the meals served. In case of emergency work done by the maintenance of way employees the cook is required to prepare and serve meals during such emergency and to follow the crew to the point of such emergency work. Plaintiff L. McLead was employed by defendant as a cook during the period from July, 1939, to May, 1941, and performed the duties of a cook as hereinbefore stated. He worked exclusively at points on the lines of the railroad company within the state of Texas. The foreman employed by the railroad company in charge of each gang to which a dining and cooking car is attached acts on behalf of defendant to check the supplies and receipts of each car and for these services he receives free board or in lieu thereof a monthly cash consideration.

[fol. 19] Texas and New Orleans Railroad Company is a common carrier engaged in the interstate transportation of both goods and persons. Employees of the railroad in the gangs for which defendant furnishes board are engaged in the work of constructing and maintaining the right of way and railroad lines of the railroad company in proper condition for the interstate transportation of persons and property by said railroad company. The practice of railroad companies with respect to the furnishing of meals for maintenance of way employees varies—some railroads,

as the Texas and New Orleans Railroad Company, make arrangements by contract for the furnishing of such meals or board by a commissary company, some railroads operate cook and dining cars for themselves for the benefit of such employees, some railroads furnish cook and dining cars to the employees who prepare and serve their own meals therein, and some railroads leave such employees entirely to their own devices for the procuring of their meals.

Defendant, in addition to its operations in Texas on the lines of the Texas and New Orleans Railroad Company, has similar operations, under contracts with other railroads, in the states of Arizona, California, Colorado, Louisiana, Nevada, New Mexico, Oregon, and Utah.

The parties agree that if the court determines that plaintiff is covered by the Fair Labor Standards Act of 1938 they will make a bona fide effort to stipulate the amount of damages, if any, due to plaintiff."

(b) A part of the evidence was heard before Honorable James V. Allred, a Judge of this District, before his resignation. I quote from his memorandum of May 9, 1942:

"There was one matter which I regarded as immaterial, upon which I heard some evidence and made a finding from the bench. It was reported, as I recall.

The question upon which I heard evidence was whether the defendants' commissary served others than railroad workmen and, if so, to what degree. I found from the evidence that if they ever furnished meals to anybody else it was only upon two or three isolated occasions and so small as to be infinitesimal."

1. The pertinent portion of Section 7 of the Act (Section 207, Title 29, U. S. C. A.) is as follows:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[fol. 20] (3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Commerce is defined by the Act (Paragraph (b) of Section 203, Title 29, U. S. C. A.), as follows:

" 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

Goods are defined by the Act (Paragraph (i) of Section 203, Title 29, U. S. C. A.), as follows:

" 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

Production or produced is defined by the Act (Paragraph (j) of Section 203, Title 29, U. S. C. A.), as follows:

" 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Doubtless the Texas and New Orleans Railroad Company and its employees to whom Defendants furnished meals and bedding were, during the period in question and under the facts stipulated, engaged in interstate commerce, but not in the production of goods for commerce within the meaning of the Act.

Plaintiff points to the decision of the Supreme Court in *Kirschbaum* v. *Walling* and *Arsenal Building Corporation* v. *Walling*, —— U. S. —— (decided June 1, 1942), and other similar cases, and insists that since the Railroad Company and its employees were engaged in interstate commerce, Defendants and Plaintiff, under the facts stipu-

lated, were engaged in commerce within the meaning of the [fol. 21] Act.

Plaintiff overlooks the fact that the language of the Act with respect to the *production of goods for commerce* is much broader than the language of the Act with respect to *engaging in commerce.* The decisions recognize this. Then too the facts here are wholly different from the facts in the referred to case of *Kirschbaum, et al.* v. *Walling, et al.* There, substantially all the tenants in the buildings in question were engaged in the production of goods for commerce, and it was held that certain of the employees of the owner and operator of the buildings were engaged in a "process or occupation necessary to the production" of such goods. Here, no goods were produced, and Plaintiff and Defendants can be held to be under the Act, if at all, only because the Railroad Company and its employees engaged, not in the production of goods for commerce, but in commerce. In the recent case of *Overstreet* v. *North Shore Corporation,* —— Fed. —— (C. C. A. 5th, decided May 28, 1942), the court, in speaking of the Act, uses this language:

"In view of the legislative history of the Act and the precise language in which it is drafted, the courts have considered it plain that Congress did not intend for the phrase, 'engaged in commerce,' to be expanded by construction to embrace employees engaged in the performance of duties merely affecting, burdening, or obstructing interstate commerce; and decisions under other and broader legislation enacted by Congress pursuant to the power to regulate commerce have no application here. Our inquiry, therefore, is whether these employees, tested by the character of the services they performed, actually were engaged in interstate commerce."

In *Jax Beer Co.* v. *Redfern,* 124 Fed. (2d) 172, Redfern and another were employed by Jax Beer Company, a Texas corporation, to make local deliveries in and around Dallas, Texas, by truck, of beer shipped to the Beer Company in interstate commerce. There, the court said (underscoring mine):

[fol. 22] *"Certain it is that these employees were not producing goods for interstate commerce, and decision must turn upon whether or not they were engaged in interstate commerce within the meaning of the act.* We are of opinion

that the work of Redfern and Wadsworth in delivering beer for the Jax Beer Company in pursuance of its local beer distributing business were intrastate in character and that they were not 'engaged in commerce' within the meaning of the Fair Labor Standards Act. *Jewel Tea Co.* v. *Williams,* 10 Cir., 118 F. 2d. 202; *Klotz* v. *Ippolito,* D. C., 40 F. Supp. 422; *Foster* v. *National Biscuit Co.,* D. C., 31 F. Supp. 552; *Fleming* v. *Arsenal Bldg. Co.,* D. C., 38 F. Supp. 207."

I do not think that either Plaintiff or Defendants were engaged in commerce within the meaning of the Act. Judgment for Defendants.

Houston, Texas, July 10, 1942.

The Clerk will file this opinion. It is adopted as Findings of Fact and Conclusions of Law.

T. M. Kennerly,
Judge.

[fols. 23-30] In United States District Court for the Southern District of Texas, Houston Division.

Civil Action

No. 705

L. McLeod, Plaintiff

vs.

M. C. Threlkeld, J. H. Threlkeld, and M. C. Threlkeld, Jr., Doing Business as Threlkeld Commissary Company, a Partnership, Defendants.

Judgment—Filed August 6, 1942.

On this the 10th day of July, 1942, came on to be heard the above entitled and numbered cause and came plaintiff by his attorney and came defendants by their attorney and the Court having considered the evidence and argument of counsel and being of the opinion that the law and the facts are with defendants, it is

Ordered, Adjudged, and Decreed that plaintiff take nothing by his suit and that defendants and each of them go hence without day with their costs in this behalf expended.

T. M. Kennerly, United States District Judge.

Approved as to Form:

Leon C. Levy, Attorney for Plaintiff. John P. Bullington, Attorney for Defendants.

[fol. 31] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10434

L. McLEOD, Appellant,

vs.

M. C. THRELKELD, et al., Doing Business as Threlkeld Commissary Company, a partnership, Appellees.

In Forma Pauperis

Appealed from the District Court of the United States for the Southern District of Texas.

OPINION—Filed December 9, 1942.

Before Holmes and McCord, Circuit Judges, and Strum, District Judge.

McCORD, Circuit Judge:

Appellant's action was for recovery of overtime compensation, liquidated damages, interest, and attorney's fees [fol. 32] under the provisions of Section 16 (b) of the Fair Labor Standards Act of 1938, 29 U. S. C. A. §§ 201-219.

Except for evidence touching the question of whether the employer's commissary "served other than railroad workmen", the facts are stipulated. The stipulated facts are carefully set out in the well-considered opinion of the trial court, *McLeod v. Threlkeld,* 46 F. Supp. 208, and no good purpose can be served by again setting them out here.

The employer was engaged in furnishing meals and beds to certain maintenance-of-way employees of a railroad. The meals were prepared and served and the beds were furnished in railway cars operating on the railroad's tracks by contract arrangement. Employees using the service paid for their own board.

Appellant was employed by appellee as cook on one of its commissary cars. His duties were to care for the car, prepare and serve meals, take care of the bedding, and keep records of the services furnished to the boarders. All of his duties were performed in Texas.

The stipulated facts clearly show that the cook was not engaged in the "production of goods for commerce", or in any "process or occupation necessary to the production thereof". He must, therefore, plant himself squarely on the contention that he was "engaged in commerce" within the meaning of Sections 6 and 7 of the Act. In this case, as in so many others involving application of the Act, the problem of the court is "one of drawing lines" and applying the Act to a particular fact situation.

In *Kirschbaum v. Walling*, 316 U. S. 517, the Supreme Court found the particular employees to be within the coverage of the Act because they were engaged "in oc- [fol. 33] cupations 'necessary to the production' of goods for commerce by the tenants". The same view was expressed in affirming this court's application of the Act to members of an oil well rotary drilling crew. *Warren-Bradshaw Drilling Co.* v. *Hall, et al.*, — U. S. —, decided November 9, 1942, affirming 124 F. 2d 42. On the agreed facts, this case is different from those cases. Here the employee did not have "a close and immediate tie" with a process for production of goods for commerce, as did the employees involved in the *Kirschbaum* and *Warren-Bradshaw* cases. McLeod was not an employee of the railroad; he performed no services for the railroad, and the railroad exercised no authority over him. Compare *Philadelphia, B. & W. R. Co. v. Smith*, 250 U. S. 101, 63 L. Ed. 869, a case arising under the Federal Employers' Liability Act, where the employee-cook held to be within the coverage of that act was working for the railroad company and moving about from place to place as a member of a gang of bridge carpenters. The present case may be distinguished on its facts: McLeod merely cooked the meals, washed the dishes, and made the beds for boarders who worked for the railroad

company. His activity was purely intrastate in character, being performed entirely within the State of Texas. The contention of the appellant, and of the Administrator of the Wage and Hour Division, as *amicus curiae,* seeks to extend the coverage of Sections 6 and 7 beyond the breaking point to cover a fact situation beyond the pale of the Fair Labor Standards Act. We think it clear that the stipulated facts establish without question that appellant was not *engaged in commerce,* but was engaged in a purely local activity not covered by the Act. See *Jax Beer Co. v. Redfern,* 124 F. 2d 172.

Our view of the case makes it unnecessary to express an opinion on the persuasive contention that under any view of the case appellee was a retail service establishment doing a wholly intrastate servicing business, and therefore with-[fols. 34-36] in the exemption contained in Section 13 (a) (2) of the Act.

Appellant was not "engaged in commerce" within the meaning and coverage of the Act.

The judgment is affirmed.